



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 9, 1997

Ms. Sheila W. Beckett  
Executive Director  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR97-2697

Dear Ms. Beckett:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 110714.

The Employees Retirement System of Texas (the "system") received two requests for a variety of information related to the Health Insurance Portability and Accountability Act, the Healthcare Financing Administration, the HealthSelect insurance program, and system enrollees. In response to the request, you submitted to this office for review the information you assert is responsive. Based on information submitted to our office, it appears that you have determined that some information does not exist, agreed to release certain information, and sought clarification for some information.<sup>1</sup> As for the submitted documents, you claim that the information is excepted from required public disclosure under section 552.107 of the Government Code. We have considered the arguments and exception you claim and reviewed the submitted information.

We note that chapter 552 of the Government Code imposes a *duty* on a governmental body seeking an open records decision pursuant to section 552.301 to submit a request for

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<sup>1</sup>We note that when a governmental body is presented with a broad request for information rather than for specific records, it should advise the requestor of the types of information available so that she may narrow her request. Open Records Decisions Nos. 563 (1990), 561 (1990) (governmental body must make good faith effort to relate request to information which it holds). In general, our office instructs governmental bodies, such as the system, to seek clarification from the requestor, when presented with a broad or unclear request for information.

a decision to the attorney general, not later than the tenth *business* day after the date of receiving the written request.<sup>2</sup> The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

In your brief to this office, you have raised various arguments to explain the basis for your failure to comply with the requirements of the act. Specifically, you claim that a ruling was not sought, because the system "relied on previous open records determinations that attorney-client communications which specifically contain the rendition of legal advice to a client, as a category of information, are not subject to compelled disclosure." You further cite to Rule 503 of the Texas Rules of Evidence to bolster your position regarding confidential communications.

It is your contention that the system is not required to request an opinion from the Attorney General's office under Government Code 552.301(a). You claim that, as previous determinations exist addressing the type of information that was requested, the system was not required to seek an opinion from this office. We disagree.

An attorney general's opinion must be sought whenever the applicability of a particular exception to particular information has not already been determined. Open Records Decision No. 435 (1986). Where only the *standard* to be applied has been addressed, the *applicability* of the standard to particular information must be determined by the attorney general. *Id.*; cf. *Houston Chronicle Publishing Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (Open Records Act does not require previous determination on specific piece of information previously determined to be public; *attorney general* has discretion to determine when previous determination has been made regarding category of information to which request belongs). This office has consistently held that previous determinations apply only to fungible information; for example, forms or other similar interchangeable types of information. Information purportedly within the attorney-client privilege and attorney work product is not fungible, but must be reviewed by this office on a case-by-case basis. Therefore, the system was required to seek an opinion on this type of information.

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<sup>2</sup>This requirement in section 552.301(a) of the Government Code has been changed to ten *business* days from ten *calendar* days. See Act of May 29, 1997, H.B. 951, § 5, 75th Leg., R.S. (act effective September 1, 1997) (amending Tex. Gov't Code Ann. § 552.301).

As the system received the request for information sometime prior to August 11, 1997<sup>3</sup> and did not request an opinion from this office until September 17, 1997, the system did not meet its obligations under chapter 552 of the Government Code, and thus, the information is presumed to be public. Open Records Decision No. 195 (1978). We note that this office has previously held that a demonstration of the applicability of section 552.107(1) does not constitute a compelling reason to overcome a presumption of openness. See Open Records Decision Nos. 630 (1994) (Gov't Code § 552.107), 473 (1987) (Gov't Code § 552.103). Therefore, the system must release the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad", written in a cursive style.

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/rho

Ref.: ID# 110714

Enclosures: Submitted documents

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<sup>3</sup>We also note that you did not submit for our review "a copy of the written request for information" as required by section 552.301(b)(2). Pursuant to section 552.303(c) of the Government Code, on October 3, 1997, our office notified you, by letter sent via facsimile, that you had failed to submit the information required by section 552.301(b). We requested that you provide this information to our office within *seven days* from the date of receiving the notice. The notice further stated that under section 552.303(e), failure to comply would result in the legal presumption that the requested information is public information. To date, you have not provided our office with the information that was requested in our notification to you.

Since you did not submit a copy of the open records request, as requested in our seven day letter, in order to determine the date the request was received by the system we relied on your letter of reply to the requestor, dated August 11, 1997, in which you state that the requestor's letter was dated July 29, 1997.

cc: Ms. Kim A. Little  
8932 Vigen Circle  
Austin, Texas 78748  
(w/o enclosures)